

UNITED 1BORNEO HYPERMALL SDN BHD
v. SEE HONG CHEEN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEONARD DAVID SHIM J
[CIVIL SUIT NO: BKI-22NCvC-7-1-2020]
14 JULY 2022

Abstract – *Once a limited company is wound-up, its assets and liabilities vest in the liquidator. The liquidator's sanction or consent would be required for a wound up company to proceed with any action or proceeding. When an action is not brought in the name and on behalf of the wound-up company, the action lacks locus standi unless it has been shown that the claimant is a creditor or contributory of the wound-up company.*

CONTRACT: *Privity – Sale and purchase agreement – Agreement executed between developer and purchaser for purchase of shop lots in mall – Mall managed by developer prior to liquidation – Liquidator of developer appointed property manager for mall – Property manager claimed for outstanding service charges and fire insurance – Whether property manager licensed under Valuers, Appraisers, Estate Managers and Property Managers Act 1981 – Whether property manager had locus standi to bring action – Whether outstanding amount ought to be paid to liquidator of developer – Whether there was privity of contract*

By seven separate sale and purchase agreements, the defendant purchased seven shop lots in 1Borneo Hypermall, Kota Kinabalu ('mall') from Sagajuta (Sabah) Sdn Bhd ('developer'). Prior to its liquidation, the developer was managing the said mall. The liquidator later appointed the plaintiff to take over the management of the mall. The defendant refused to pay outstanding service charges of the seven shop lots for the months of January 2019 to January 2020 and the fire insurance for four shop lots from June 2019 to May 2020 to the plaintiff on the ground that the plaintiff was not licensed under the Valuers, Appraisers, Estate Managers and Property Managers Act 1981 ('VAEAPMA'). In this claim, the plaintiff sought against the defendant for, *inter alia*, (i) the outstanding charges of RM1,083,750.69 for the seven shop lots from January 2019 to January 2020 plus the interest of RM95,543.22 calculated up to 21 December 2019; (ii) fire insurance for the four shop lots; and (iii) agreed interest at the rate of 1.5% per month on the total outstanding sum of RM1,205,600.31 from 18 January 2020 until full settlement. The court first considered the issue of *locus standi*. If the plaintiff lacked *locus standi* to bring this action, it would not succeed in its claim for service charges regardless of whether it was licensed to carry on property management practice.

A Held (dismissing claim):

- (1) The liquidator's sanction or consent would be required under s. 486 of the Companies Act 2016 for the wound-up company, the developer, and their counsel to proceed or continue with any action or proceeding. The plaintiff was not the liquidator, creditor or contributory of the developer. By a letter dated 5 March 2020, the liquidator clearly stated that the appointment of the plaintiff was solely to manage and operate the said mall. At no time did the liquidator authorise the plaintiff to commence this action. The liquidator confirmed that the plaintiff did not apply or obtain sanction or authority from the liquidator to commence this suit against the defendant. Neither did the plaintiff apply to the court to authorise the plaintiff to bring and prosecute this suit on behalf of the liquidator and in the name of the developer. (paras 19 & 20)
- (2) The plaintiff had failed to prove on a balance of probabilities that it had the *locus standi* to institute and maintain this action for service charges against the defendant. The plaintiff filed this action under its own name. The plaintiff was not permitted to usurp the power of the liquidator to institute the present action against the defendant. The action filed by the plaintiff herein was invalid and void *ab initio*. On this ground alone, this action should be dismissed. (paras 21, 22 & 63)
- (3) The plaintiff needed to be licensed and registered under the VAEAPMA to collect service charges for services rendered as a property manager. It was undisputed that the plaintiff did not have a license to carry out services as a property manager and collect service charges as required under the VAEAPMA. In the absence of such a license, the plaintiff could not make a claim and recover in court such fee or service charges pursuant to s. 22J(1)(f) of the VAEAPMA. (para 55)
- (4) There was no privity of contract between the plaintiff and the defendant. The sale and purchase agreements were entered between the developer and the defendant. The plaintiff was not a party to the SPA. Hence, the service charges should be paid to the liquidator on behalf of the developer. (para 62)

Case(s) referred to:

- Carol Christopher Pelly lwn. Puspa Muniandy* [2012] 1 LNS 442 HC (*refd*)
- Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1 CA (*refd*)
- Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88 CA (*refd*)
- Kunci Semangat Sdn Bhd v. Thomas Varkki MV Varkki & Anor* [2022] 1 LNS 424 CA (*refd*)
- Lai King Lung & Anor v. Merai Sdn Bhd* [2020] 9 CLJ 449 FC (*refd*)
- Mahmood Ooyub v. Li Chee Loong & Other Appeals* [2020] 1 LNS 660 CA (*refd*)

- Malaysia Land Properties Sdn Bhd & Anor v. Simesilk Sdn Bhd* [2014] 7 CLJ 1117 HC (refd) A
- Mok Shook Mooi (aka Sherene Mok) v. Perbadanan Pengurusan Prisma Perdana (Through Its Secretary, Wong Kui Man) & Ors* [2017] 1 LNS 333 HC (refd)
- Prangin Mall Sdn Bhd v. Tang Joo Ming & Anor* [2012] 1 LNS 1285 CA (refd)
- Tetuan Sulaiman & Taye v. Wong Poh Kun & Anor* [2020] 10 CLJ 121 HC (refd)
- Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1 FC (refd) B
- Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 FC (refd)

Legislation referred to:

- Companies Act 1965, s. 236(2)(d)
- Companies Act 2016, ss. 471, 486(1)(a), (2), Part 1, Twelve Schedule
- Contracts Act 1950, s. 24 C
- Land (Subsidiary Title) Enactment 1972, s. 14
- Rules of Court 2012, O. 59 r. 22(1)
- Valuers, Appraisers, Estate Agents and Property Managers Act 1981, ss. 22I, 22J(1)(e), (f), (2), (3)
- For the plaintiff - Roland Cheng; M/s Roland Cheng & Co* D
- For the defendant - Deborah Celestine Tan Chee & Winona Emmanuel; M/s Tan Arthur Borine & Partners*

Reported by Lina E

JUDGMENT

Leonard David Shim J:

[1] In this action, the plaintiff is claiming against the defendant under seven separate sale and purchase agreements all dated 26 November 2013 for outstanding service charges and other outgoings for managing the United 1Borneo Hypermall, Kota Kinabalu. The orders or reliefs sought by the plaintiff are, *inter alia*, as follows: F

- (i) outstanding service charges of RM1,083,750.69 for the said seven shop lots from January 2019 to January 2020 plus the interest of RM95,543.22 calculated up to 31 December 2019;
- (ii) fire insurance of RM26,306.40 for the shop lots in Unit No. C-200, G-118, G-119 and G-124; G
- (iii) interest at the rate of 10% per annum on the total outstanding sum of RM1,205,600.31 from the date of judgment until full settlement thereof;
- (iv) statutory interest at the rate of 5% per annum on the total outstanding sum of RM1,205,600.31 from the date of judgment until full settlement thereof. H

[2] The plaintiff called only one witness, Javed Irshad Sani (PW1) who prepared a written witness statement. The defendant called two witnesses namely himself, See Hong Cheen @ See Hong Chen (DW1) and the liquidator, Tee Guan Pian (DW2). The defendant prepared a witness statement and the liquidator, as a sub-poena witness, gave oral testimony. I

A Background Facts

B [3] The material facts of this case are undisputed. By seven separate sale and purchase agreements all dated 26 November 2013 (“SPA”), the defendant purchased seven shop lots in Unit No. C-200, F-119, F-120, F-121, G-118, G-119 and G-124 (hereinafter collectively referred to as “said seven shop lots”) in United 1Borneo Hypermall, Kota Kinabalu (“said mall”) from Sagajuta (Sabah) Sdn Bhd (Company No. 483576-K) (“the developer”) (refer pp. 12 to 219 PBD1 & pp. 220 to 228 PBD2).

C [4] The said mall was built on a parcel of land measuring approximately 23.3 acres and the title deed of the said land has been issued to United Sabah Islamic Association under Master Title No. CL 015607057 (the said land).

D [5] There is no dispute on the amount claimed and interest for the service charges. The main dispute is on the *locus standi* of the plaintiff to claim for the service charges and whether the claim by the unlicensed property manager (plaintiff) is tainted with illegality.

E [6] Datuk Tee Guan Pian (“Datuk Tee”) was appointed under the High Court Order dated 6 February 2017 as liquidator of the said developer (“the liquidator”) (refer pp. 25 to 27 PBD3). Prior to its liquidation, the developer was managing the said mall. With effect from 1 January 2019, the liquidator appointed the plaintiff on 19 December 2018 to take over the management of the said mall from the previous manager, 1Borneo Management Corporation Sdn Bhd (refer p. 230 PBD2).

F [7] The defendant refused to pay the outstanding service charges of the said seven shop lots for the months of January 2019 to January 2020, the fire insurance for the shop lots in Unit No. C-200, G-118, G-119 and G-124 for the period 1 June 2019 to 31 May 2020 to the plaintiff on the ground that the plaintiff is not licensed and registered under the Valuers, Appraisers, Estate Managers and Property Managers Act 1981 (the VAEAPMA 1981). However, the defendant is prepared to pay the outstanding service charges to the liquidator and has paid the service charges due for Unit No. C-200 to the liquidator. See pp. 32 to 38 PBD3 (encl. 107).

G [8] The plaintiff claim against the defendant as follows:

- H** (i) The outstanding service charges of RM1,083,750.69 for the said seven shop lots from January 2019 to January 2020 plus the interest of RM95,543.22 calculated up to 31 December 2019;
- (ii) The fire insurance of RM26,306.40 for the shop lots in Unit No. C-200, G-118, G-119 and G-124;
- I** (iii) The agreed interest at the rate of 1.5% per month on the total outstanding sum of RM1,205,600.31 from 18 January 2020 until full settlement thereof;

- (iv) Costs of filing writ and statement of claim in the sum of RM416; A
- (v) Costs of filing reply, if any, in the sum of RM16;
- (vi) Costs pursuant to O. 59 r. 22(1) of ROC 2012; and
- (vii) Such further or better relief as this Honourable Court deems fit. (Refer BOP & ID1 converted to P1) B

The total amount claimed is RM3,591,776.38 as at November 2021.

[9] The agreed facts (encl. No. 131) marked as AF *in verbatim*, are as follows:

Agreed Facts (Enclosure No. 131) C

- (i) The defendant had purchase seven units of shop lots in United 1Borneo Hypermall ("said mall") by seven sale and purchase agreements all dated 26 November 2013 for Unit No. G-118, G-119, G-124, C-200, F-119, F-120 and F-121 (refer page 2 to 50, 99 to 147, 148 to 196, 197 to 245, 246 to 294, 51 to 98 and 295 to 34 DBOD respectively). D
- (ii) The plaintiff had been wound-up and Datuk Tee Guan Pian had been appointed as the liquidator on 6 February 2017 (refer pp. 25 to 27 PBODv3).
- (iii) The liquidator had on 19 December 2018 appointed the plaintiff as the manager of the said mall (refer p. 230 PBODv1) with effect from 1 January 2019. E

[10] As there are no agreed issues to be tried, based on the pleadings and submissions filed by the parties, the defence has raised the following issues: F

- Issue (i): That the plaintiff is not licensed and registered to practice as a property management company (refer paras. 4(i) and 9 of encl. 118).
- Issue (ii): That the plaintiff is not privy to the SPA (refer para. 7(i) of encl. 118). G
- Issue (iii): That all payments of service charges are to be paid to the developer and the management corporation and the plaintiff has no *locus standi* to issues invoices and file suit (refer paras. 7(ii), (iii) and of encl. 118.). H

These issues are essentially questions of law to be determined based on the facts and evidence adduced by the parties in court.

[11] After perusing the pleadings and issues raised by both parties, the court will first consider the issue of *locus standi* raised in issue (iii) which is inter-related to issue (ii) on privy of contract. If the plaintiff lacks the *locus* I

- A *standi* to bring this action, it will not succeed in its claim for service charges regardless of whether it is licensed to carry on property management practice.

Contention And Findings On Issue (iii) – *Locus Standi*

- B [12] The plaintiff contends that *vide* the three letters of appointment all dated 19 December 2018, the plaintiff had stepped into the shoes of the developer under cl. 30 of the SPA and have the *locus standi* to bring this action. It is undisputed that the developer, Sagajuta (Sabah) Sdn Bhd (Sagajuta) has been wound-up on 6 February 2017 and Datuk Tee Guan Pian (DW2) is currently the sole liquidator of Sagajuta. It is an agreed fact that
- C the plaintiff was appointed by the liquidator as property manager to manage the said mall with effect from 1 January 2019. Pursuant to cl. 12 and s. 6 of the First Schedule of the SPA, the developer has the right to collect service charges from the purchaser until the formation and establishment of the management corporation. See p. 8 of DCBA. Similarly, the developer also
- D has a responsibility or liability under the SPA to manage the said mall prior to the establishment of the management corporation and take the necessary action to apply for the sub-division of the said land and obtain a separate and subsidiary title for the parcels purchased by the defendant as provided for under the Land (Subsidiary Title) Enactment 1972 (the 1972 Enactment).
- E Upon issuance of the individual subsidiary title for the said parcels, the developer shall to forthwith execute a valid and registrable transfer of the said parcels to the defendant. See p. 6 of DCBA (encl. 136). It is an undisputed fact that the plaintiff is not licensed under the VAEAPMA 1981 as a property manager and/or to undertake property management practice at
- F all material times.

- [13] It is trite that once a limited company is wound-up, its assets and liabilities vest in the liquidator. Therefore, the assets and liabilities under the SPA vests in the liquidator and it is for the liquidator to decide whether to institute, continue the prosecution of or defend legal proceedings. In *Zaitun*
- G *Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785, the Federal Court (per Gopal Sri Ram FCJ) held:

- (1) *Once a limited company is wound-up, its assets and liabilities vest in the liquidator. It is up to him to decide whether to institute, continue the prosecution of or defend legal proceedings. Once authority is given either by the liquidator*
- H *or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question.*

- (2) *However, the court has jurisdiction to authorise other persons to conduct litigation in the name of the company. The court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. Where, as in the*
- I *instant case, the liquidator grants authorisation, there is no necessity to move the court. Russell v. Westpac Banking (foll).*

(3) Since a *director* – or more appropriately a *former director* of a company in liquidation – is *not a party to the liquidation*, a court will not authorise such director to launch or to continue proceedings or indeed to defend the company. All the more, the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. Thus in the instant case, KHI ought not to have been authorised to continue with the proceedings. *It could well have been different if KHI had also been a creditor or a contributory.* *Cape Breton Company v. Fenn* (foll). (emphasis added)

A

B

[14] In *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88, the Court of Appeal (per Ramly Ali JCA) held:

(1) ...

C

(2) Section 236(2) of the CA strengthened the position that only the OA as the appointed liquidator had the power to bring or defend any action or other legal proceeding in the name and on behalf of the wound-up company.

(3) There was no evidence to show that the commencement of the present action by the appellant itself on 26 February 2009 was done with the knowledge and authority of the OA as the liquidator. The appellant or its shareholders or creditors could not usurp the powers of the liquidator in initiating the present action against the respondent. The appellant cannot commence the action and then later, after objections raised by the respondent, apply for leave or sanction from the OA.

D

(4) The authority given by the OA was dated 3 March 2011, more than two years and three months after action was filed in court. There are no provisions of law to authorise that leave or sanction of the OA is to have retrospective effect. The appellant lacked *locus standi* right from the time when the action was filed. Therefore the action was invalid and void *ab initio*. Subsequent leave or approval by the OA which came more than two years later could not legalise or validate an action which was invalid and void *ab initio*; *Cheng Heng Ping & Ors v. Perwira Affin Bank Bhd* (refd). (emphasis added)

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[15] Section 471 of the CA 2016 provides:

Action or proceeding stayed after winding-up order

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471(1) When a winding-up order has been made or an interim liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and in accordance with such terms as the Court imposes.

(2) The application for leave under subsection (1) shall be made in the Court granting the winding-up order and shall be served on the liquidator.

H

(3) The office copy of the order for leave under subsection (1) shall be lodged by the applicant referred to in subsection 470(1) with the Registrar and with the Official Receiver within fourteen days from the making of the order.

I

A [16] Section 486 of the CA 2016 provides:

Powers of liquidator in winding-up by Court

486(1) Where a company is being wound-up by the Court, the liquidator may:

- B (a) **without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and**
(b) **with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.**

C (2) The exercise by the liquidator in a winding-up by the Court of the powers conferred by this section is subject to the control of the Court and **any creditor or contributory** may apply to the Court with respect to any exercise or proposed exercise of any of those powers. (emphasis added)

[17] Part 1 of the Twelve Schedule of the CA 2016 provides:

D **Power exercisable without authority**

The liquidator may:

- (a) **bring or defend any action or other legal proceedings in the name and on behalf of the company;**
E (b) - (l) ... (emphasis added)

[18] In *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449, the Federal Court explained as follows:

- F [21] At the outset, it is important to appreciate that there are *two different and distinct fact situations under which leave of the court or sanction of the liquidator is required. The first is in respect of action or proceeding against a wound-up company. This situation is governed by s. 226(3) of the 1965 Act/s. 471(1) of the 2016 Act which provides that leave of court is necessary in order for any action or proceeding proceeded with or commenced against a wound-up company. The second scenario is where action or proceeding is taken by a wound-up company:*
G *s. 236(2)(a) & 236(3) of the 1965 Act/s. 486 of the 2016 Act read together with Part I of the Twelfth Schedule which requires the sanction of the liquidator to be obtained. The factual matrix in this appeal falls under the latter scenario.* (emphasis added)

H [19] With respect to the relevant sanction or consent of Datuk Tee as the liquidator of the first plaintiff company, the liquidator's sanction or consent would be required under s. 486 of the CA 2016 for the wound-up company, Sagajuta and their counsel to proceed or continue with any action or proceeding. See *Lai King Lung's* case above. See also (i) *Zaitun Marketing Sdn Bhd v. Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785 FC, (ii) *Hup Lee Coachbuilders Holdings Sdn Bhd v. Cycle & Carriage Bintang Bhd* [2012] 10 CLJ 88; [2013] 1 MLJ 406 and (iii) *Winstech Engineering Sdn Bhd v. ESPL (M) Sdn Bhd* [2014] 2 CLJ 1; [2014] 3 MLJ 1.

[20] In the present case, the plaintiff is not the liquidator or creditor or contributory of Sagajuta. By a letter dated 5 March 2020, the liquidator clearly stated that the appointment of the plaintiff is solely to manage and operate the said mall. See p. 1 of DCBC (encl. 136). At no time did the liquidator authorise the plaintiff to commence this action. The liquidator, DW2 confirmed that the plaintiff did not apply or obtain sanction or authority from the liquidator to commence this suit against the defendant. Neither did the plaintiff apply to the court to authorise the plaintiff to bring and prosecute this suit on behalf of the liquidator and in the name of Sagajuta. Instead, the plaintiff filed this action under its own name. As explained earlier, under s. 486(2) of the CA 2016, only the liquidator had the power to bring or defend any legal action or other legal proceeding in the name and on behalf of the wound-up company. The plaintiff is not permitted to usurp the power of the liquidator to institute the present action against the defendant. See *Hup Lee Coachbuilders* above.

[21] Although the court has jurisdiction to authorise other persons to conduct litigation in the name of the wound-up company, the court could not authorise the plaintiff to bring this action as no sanction was sought from or refused by the liquidator and this action is not brought in the name and on behalf of the wound-up company, Sagajuta. The plaintiff did not plead in its statement of claim that it brings this action on behalf of the Sagajuta. Further, it has not been shown that the plaintiff is a creditor or contributory of Sagajuta. See *Zaitun Marketing* above.

[22] Thus, s. 486 read together with Part 1 of the Twelve Schedule of the CA 2016 has not been complied with by the plaintiff. Even if it has been complied with, (which this court had found otherwise), the plaintiff could not bring and prosecute this action in its own name but has to bring the proceedings in the name of Sagajuta Sdn Bhd (in liquidation). Applying the principles enunciated by the appellate courts above to the present case, this court finds that the plaintiff lacked the *locus standi* to file and prosecute this action. Therefore, the action filed by the plaintiff herein is invalid and void *ab initio*. See *Hup Lee Coachbuilders*, *Zaitun Marketing* and *Lai King Lung* above. On this ground alone, this action could be dismissed.

[23] Further, it is undisputed that the management corporation of the said mall has not been established under s. 14 of the Land (Subsidiary Title) Enactment 1972 of Sabah. Prior to the establishment of the management corporation, the right to of the developer in Sabah to collect service charges is a contractual right conferred under the SPA. Unlike the position of a developer in Peninsula Malaysia where the Strata Management Act 2013 gives the developer a statutory right to collect maintenance and service charges prior to the establishment of the management corporation, the Land

- A (Subsidiary Title) Enactment 1972 of Sabah does not give a developer in Sabah such statutory right. In *Prangin Mall Sdn Bhd v. Tang Joo Ming & Anor* [2012] 1 LNS 1285, the Court of Appeal held:

B [17] The right to collect the Charges granted to JMB under s. 8(2) of the Act is different from the Developer's right under the contract. Section 8 of Act 663 provides the JMB with the right to collect the Charges in proportion to the allocated share units of their respective parcel. It is a statutory power giving authority to JMB to collect the Charges. Corresponding to the right of JMB to collect, the purchasers are bound by law under s. 23(1) of Act 663 to pay the Charges. Failure on the part of the purchasers to pay the charges to JMB is an offence under s. 34 of Act 663 punishable with a fine not exceeding RM5,000.00 and shall also be liable to a further fine not exceeding RM50,000.00 for every day during which the offence is continued after conviction. In our opinion therefore, the power to collect the Charges under Act 663 is a newly created right and only commences upon formation of the JMB. It is distinct and different from the contractual right of Developer under the Sale and Purchase Agreement. For the above reason, we hold that there was no "handing over" of the Developer's right to collect the Charges as submitted by the learned counsel for the Respondents.

E [18] Any "handing over" or transfer of contractual rights can only take effect if there is an assignment of such rights either contractually or by law. There is no evidence of an assignment of the contractual right, nor any provision in Act 663 that transfers or hand over that contractual right. In this regard, we are mindful that if the words in the statute are clear and precise, then no more can be said or inferred than those words in the ordinary sense. The claim by the Appellant in the proceedings before the Sessions Court was premised on the contractual obligations that had clearly been breached by the Respondents. The law does not prohibit the Appellant from pursuing its claim, which incidentally is no more than a claim for breach of contract prior to the formation of JMB. (emphasis added)

G [24] In the present case, the plaintiff did not plead an assignment of the developer's contractual right under the SPA to collect and/or make a claim for service charges against the parcel owners. Neither is there any evidence of an assignment of such contractual right to maintain a claim for service charges. Under cl. 22.3 of the Fifth Schedule (Mutual Covenants) of the SPA, no interest right or individual share of the purchaser in the funds and assets of the management corporation may be assigned, hypothecated or transferred in any manner except as an appurtenance to the parcel. See p. 48 of DCBC (encl. 136). The plaintiff contends that the three letters of appointment was issued to appoint the plaintiff to assist the liquidator to exercise the developer's contractual rights under cl. 30 of the SPA to manage and operate the said mall.

I [25] After perusing the three letters of appointment, it is evident that those letters are not intended to be an assignment of the debt or right to claim and/or sue for service charges to the plaintiff. Applying the principle in *Prangin*

Mall's case to the present case, an assignment of the debt or service charges from the developer or liquidator to the plaintiff is required to give the plaintiff the *locus* to maintain its claim against the defendant for the outstanding service charges due prior to the establishment of the management corporation.

[26] In the absence of such assignment, the plaintiff has no *locus* to maintain its claim against the defendant in this action and the service charges should be paid to the liquidator on behalf of Sagajuta (Sabah) Sdn Bhd (in liquidation). However, in the event that I have erred in my finding on *locus standi*, I will proceed to consider the other issues raised by the parties.

Issue (i) – Licence To Carry On Property Management Practice

[27] The defendant contends that the plaintiff must be licensed under the VAEAPMA 1981 to collect and maintain this action for service charges and referred to s. 22J as follows:

Restriction on property management practice;

Section 22J of the 1981 Act

- (1) NO PERSON shall, unless he is a registered property manager and has been issued with an authority to practice under Section 16.
 - (a) Practice or carry on business or take up employment under any name, style or title containing the words Property Manager, Managing Agent, or the equivalent thereto in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered property manager or he is engaged in property management practice or business;
 - (b) Act as a property manager;
 - (c) Carry on business or take up appointment or engagement as a property manager;
 - (d) Display any signboard or poster, or use, distribute or circulate any card, letter, pamphlet, leaflet, notice or any form of advertisement, implying either directly that he is a registered property manager or he is engaged in property management practice or business;
 - (e) Undertake for a fee or other consideration any of the work enumerated in subsection 221(2); or
 - (f) Be entitled to recover in any court any fee, commission, charge or remuneration for any professional advice or services rendered as a property manager.

- A [28] The defendant submits that it is in evidence where DW2 conceded that the plaintiff did not possess a valid license required by the relevant authorities.

See examination in chief of DW2:

- B Q6: During the appointment, are you aware that the Plaintiff does not possess the relevant license to practice as a qualified and certified property manager or management company?

A: Yes

...

- C Q8: Does your letter in a way suggest the need for the Plaintiff to possess license to manage and operate the Mall?

A: My letter suggest there is a need for the Plaintiff or an agent appointed by him to possess license to manage and operate the Mall.

D

...

Q10: Refer to the same document, page 1 of DCBC at Lines 4 to 5 of Item 1. Can you explain what you meant by “should they fail to obtain the relevant license, then we will terminate U1BH as manager of the mall?

E

A: This is quite a standard wording for an appointment of agent.

Q11: Since the letter mentioned that if the Plaintiff does not possess the relevant license and you answered that this is a standard wording of an appointment of agent, isn't it literally means that since the Plaintiff does not possess the relevant license to practice as a qualified and certified property management company, therefore termination should have taken place or should have been done?

F

A: In this case, it's obvious the Plaintiff doesn't possess a license but they do produced a Third Party license.

- G [29] In this case, *vide* DW2's letter dated 5 March 2020 (see p. 1 of defendant's bundle of documents (Part C)), DW2 had made it clear in the said letter on the position of the plaintiff. The plaintiff quoted *in verbatim* as follow:

- H 1. Prior to the subdivision of titles, Sagajuta as the Developer has right to appoint United 1Borneo Hypermall Sdn Bhd (“U1BH”) as manager to manage the Mall in place of 1Borneo Management Corporation Sdn Bhd. Please advise us what are the relevant license required for U1BH to manage the Mall and we will request the same from U1BH. Should they fail to obtain the relevant license, then we will terminate U1BH as manager of the Mall; and

I

2. The appointment of U1BH is solely to manage and operate the Mall. We shall clarify with U1BH pertaining to the legal action commence and shall revert to you soonest possible.

A

[30] The defendant submits that the content of the above letter dated 5 March 2020 has not been rebutted by the plaintiff, neither were there any cross-examination by the plaintiff on the same.

B

[31] Reference is also made by the defendant to the defendant's bundle of documents (Part A), where it shows that the plaintiff is not registered under the Board of Valuers, Appraisers, Estate Agents and Property Managers. (See p. 1 of DBOD (Part A)).

C

[32] On this point alone, the defendant submit that the plaintiff has no legal right to demand any payments from the defendant. Not only so, but the plaintiff on its own capacity has no *locus standi* to commence this suit against the defendant on behalf of Sagajuta (Sabah) Sdn Bhd.

[33] The defendant further submit that the plaintiff was merely appointed to manage and operate the said mall, and not anything beyond that. By issuing, collecting fees from the tenants (including from the defendant), remitting and expense of all these trust monies, the plaintiff contravened the SPA and the VAEAPMA 1981 and had exceeded their scope of management.

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[34] The plaintiff contends that upon winding-up of the said developer, the said liquidator stepped into the shoes of the said developer under the SPA. Hence, the said liquidator merely exercised the contractual right of the said developer under cl. 30 of the SPA to appoint the plaintiff as the manager of the said mall:

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Clause 30 Power of Developer to Appoint Agent/Manager

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... the Developer reserves the right to appoint or engage any person, firm or body corporate as the Developer's agent or manager and such agent or manager shall be vested with the power to control, manage and run the administration of the Commercial Centre and shall have the right to enforce against the Purchaser the agreements and covenants of the Purchaser contained herein and to exercise all other rights of the Developer contained in this Agreement.

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By reason thereof, the plaintiff was appointed by the said liquidator as the agent of the developer (and not as agent of liquidator) under cl. 30 of the SPA to exercise all the powers of the developer.

H

[35] The plaintiff submits that the contractual powers under cl. 30 of the SPA are separate and different from the statutory powers of the liquidator under s. 236(2)(d) of the Companies Act 1965 and s. 486(1)(a) of the CA 2016 as follows:

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- A Section 236(2)(d) Companies Act 1965**
Do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal; ...
- B Section 486(1)(a) Companies Act 2016**
Where a company is being wound up by the Court, the Liquidator may:
(a) Without the authority under paragraph (b), exercise any of the general powers specified in Part I of the twelfth Schedule; and ...
- Twelfth Schedule Part I**
- C** The Liquidator may:
(d) do all acts and execute in the name on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary, the company's seal; ...
- D** Therefore, the plaintiff submits that the statutory powers under CA 2016 and contractual powers under the SPA of the liquidator are separate and distinct because the contractual powers herein in the management of the said mall does not concern the assets of the said developer.
- E** [36] Notwithstanding the distinction in the powers of the liquidator, the plaintiff contends that the three letters all dated 19 December 2018 ("said letters of appointment") (refer pp. 230 to 232 PBD2), concern the critical issues that there is no asset of the said developer involved since all the assets in the said mall are common property. Datuk Tee as liquidator of the said developer is merely performing an administrative duty to exercise the developer's contractual rights under cl. 30 of the SPA and not the statutory duties of the liquidator under the Companies Act 2016 as follows:
- F**
- (i) Appoint the plaintiff as manager of the said mall including the common area in place of 1Borneo Management Corporation.
- G**
- (ii) Consent and authorise the management of said mall including the common area and to exercise all the powers under the SPA.
- (iii) Consent and authorise the usage of supply lines, electricity plant and equipment in the said mall and common area.
- H** [37] The plaintiff submits that the fundamental distinction in the said letters show that the said liquidator is not involved in the management of the said mall. This is highlighted in the testimony of the said Datuk Tee at NOP pp. 66 and 67 as follows:
- I** Q10: PUT: That the reason why you issued three letters all dated 19.12.2018 to the Plaintiff is to give him all the powers of management, all the powers of the developer under the SPA and all the powers of ownership of the electrical facilities. Do you agree?

A: Yes, that was the intention. (Refer page 66 of NOP).

A

Q17: PUT: That because your third letter also dated 19.12.2018 gave the Plaintiff the powers over the electrical supply lines and equipment in addition to your first and second letter, you have given full powers as owner of the entire complex to the Plaintiff. Do you agree?

B

A: I agree. That was the intention.

[38] The plaintiff submits that since the plaintiff is stepping in the shoes of the said developer under cl. 30 of the SPA, there is no necessity for the plaintiff to obtain the licenses of a property manager under the Valuers, Appraisers, Estate Agents and Property Management Act 1981 (“said VAEAPMA 1981”).

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[39] In any event, even if a property manager license is required of the plaintiff (which is denied), the plaintiff contends that there is an exception under s. 22J(2) of the VAEAPMA 1981. Further, the said developer as equitable owner has been granted a power of attorney to act on behalf of the land owner (refer para. 4 p. 13 (“beneficial owner”) and p. 32 (“power of attorney dated 23 March 2005”) of PBD1) and falls within the exception of s. 22J(2) of the VAEAPMA 1981 as landowner.

D

Section 22J Restriction on property management practice

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(1) No person shall, unless he is a registered property manager and has been issued with an authority to practise under section 16:

...

(b) act as a property manager;

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...

(2) Paragraph (1)(b) shall not apply to the owner of any land, building and any interest therein who manages such land, building and interest.

[40] However, the plaintiff submits that out of an abundance of caution and for good governance, the plaintiff has appointed a licensed property manager to manage the said mall through Mr Javed Irshad Sani from 1 January 2019 to 31 March 2019 (refer p. 234 PBD2), Taylor Hobbs from 1 April 2019 to 31 March 2020 (refer pp. 2 to 11 PBD1) and J Sani Management Services on 1 April 2020 (refer p. 412 PBD2). Therefore, the plaintiff is properly licensed for the period of the claim.

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[41] The plaintiff referred to the High Court case of *Tetuan Sulaiman & Taye v. Wong Poh Kun & Anor* [2020] 10 CLJ 121; [2021] 8 MLJ 550, per Ong Chee Kwan JC (as His Lordship then was) held that:

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- A (5) ... Where a claim was made under s. 304(1) of the CA 1965 or under s. 540(1) of the Companies Act 2016, and the company had already been wound up, unless there were good reasons, any payments by the delinquent directors of the company or persons who knowingly were parties to the carrying on of the business in that manner, ought to be paid to the liquidator as contribution to the company's assets instead of an order for the payment to be made directly to the defrauded creditor who filed the claim. Accordingly, the defendants were jointly and severally liable to pay the sum of RM5,907,500 and the sum due to the Government of Malaysia to the liquidator of Bistari Land as contribution to the assets of the company (see paras. 89 & 92).
- B
- C [42] During DW2, Tee Guan Pian's cross-examination, he testified that:
- Q4: And that would you agree that as the Liquidator you actually stepped into the shoes of Sagajuta under the provisions of the Companies Act 2016?
- A: Yes, I agree.
- D Q5: Is it correct that you did manage the 1Borneo Mall as Liquidator for a period of about 2 ½ years after your appointment as Liquidator without appointing any Third Party property manager to assist you?
- A: I disagree. I didn't manage the mall. Another company was appointed to assist me.
- E Q6: And that company was the 1Borneo Management Corporation Sdn Bhd which is a wholly own subsidiary of Sagajuta, is that correct?
- A: It is a normal practice of liquidation job. I didn't take control of this subsidiary. (Refer p. 64 of NOP).
- F The plaintiff submits that DW2's own evidence shows that the liquidator does not get involved in the management of the said mall.
- [43] The plaintiff submits that the answer to sub issue (i) is that the plaintiff does not require any property manager license under the VAEAPMA 1981. However, if the plaintiff does require such license (which is denied), this has been complied with.
- G

Findings On Issue (i)

- [44] It is undisputed that the plaintiff is not licensed and registered under s. 22J of the VAEAPMA 1981 to act as a property manager or carry on property management practice. However, the plaintiff contends that under cl. 30 of the SPA, the contractual powers herein does not concern the assets of the said developer since all the assets in the said mall are common property. The plaintiff contends that the plaintiff is stepping into the shoes of the said developer under cl. 30 of the SPA and there is no necessity for the plaintiff to obtain the licences of a property manager under the VAEAPMA 1981. As stated above, once the company, Sagajuta is wound-
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up, its assets and liabilities vest in the liquidator. In the absence of an assignment of the developer's contractual right to claim for service charges to the plaintiff by the liquidator on behalf of the developer, the plaintiff has no *locus* to maintain this claim for service charges against the defendant. See *Prangin Mall* above.

[45] It is undisputed that upon the petition by a creditor, Government of Malaysia, the developer has been wound-up by the court on 20 June 2016 and the late Wong Shan Ty and Datuk Tee Guan Pian have been appointed as joint liquidator of the developer. The late Wong Shan Ty was subsequently removed from being a joint liquidator pursuant to an order of the court dated 21 March 2019 and since then Datuk Tee Guan Pian is the sole liquidator. Upon the winding-up of Sagajuta, all the assets and liabilities of the wound-up company vests in the liquidator, DW2. However, the liquidator, Datuk Tee Guan Pian is not licensed and registered under the VAEAPMA 1981 to practice as a property manager and manage the said mall. 1Borneo Management Corporation Sdn Bhd was managing the said mall before the appointment of the plaintiff. 1Borneo Management Corporation Sdn Bhd was not licensed to act as a property manager.

[46] Hence, the liquidator appointed the plaintiff in place of 1Borneo Management Corporation Sdn Bhd to take over the management of the said mall including the common area, with effect from 1 January 2019. See p. 13 CBB (encl. 135). However, the plaintiff is also not licensed and registered under the VAEAPMA 1981 to carry out property management practice. Consequently, the plaintiff appointed Mr Javed Irshad Jain (PW1), a registered property manager as Consultant-General Manager of the plaintiff with effect from 1 January 2019 to assist the plaintiff to manage the business and functions of the plaintiff and its subsidiaries. See pp. 17 to 18 of CCB. J Sani was at all material times the sole proprietor of J Sani Property Management Services (J Sani) and have been providing property management services to the plaintiff since 1 April 2019. See para. 1 of PW1-WS. It is not disputed that J Sani was not expressly appointed by the liquidator.

[47] The scope of the Valuers, Appraisers and Estate Agents Act 1981 (Act 242) was expanded by the Valuers, Appraisers and Estate Agents (Amendment) Act 2017 (the said amendment Act) to include property manager who are required under the said amendment Act to obtain an authority to practice from the Board of Valuers, Appraisers and Estate Agents and Property Managers (the Board) to practice as a registered Property Manager under s. 22I of the VAEAPMA 1981. The explanatory statement to the Valuers, Appraisers and Estate Agents (Amendment) Bill provides as follows:

- A This Bill seeks to amend the Valuers, Appraisers and Estate Agents Act 1981 (Act 242). The proposed amendments seek to provide for the registration of property managers and probationary property managers for related matters. Those amendments also seek to provide for the separation of the property management practice from the valuation and estate agency practice.
- B [48] To determine whether the plaintiff need a license under the VAEAPMA 1981 to manage the said mall despite having engaged a licensed property manager, J Sani to manage the same, it is necessary to look at what was the role and scope of work of the plaintiff and that of J Sani in managing the said mall.
- C [49] Property management practice is defined in s. 22I of the VAEAPMA 1981 as follows:
- D (1) Subject to the provisions of this Act, a registered property manager who has been issued with an authority to practise by the Board shall be entitled to practise his profession and shall be authorised to undertake property management practice.
- E (2) The property management practice referred to in subsection (1) includes the following:
- F (a) enforcing the terms of leases and other agreements pertaining to the property;
- G (b) preparing budgets and maintaining the financial records for the property;
- (c) monitoring outgoings for the property and making payments out of the income from the property;
- F (d) advising on sale, purchase and letting decisions;
- (e) advising on insurance matters;
- (f) advising on the opportunities for the realization of development or investment potential of the property;
- G (g) advising on the necessity for upgrading the property or for the merging of interests;
- (h) managing and maintaining the building and facilities attached to the building; and
- H (i) making or checking of inventories of furniture, fixtures, trade stocks, plant or machinery, or other effects.
- I [50] In his evidence, PW1 testified that his scope of work includes:
- Q1: What service do you provide for the Plaintiff, United 1Borneo Hypermall Sdn Bhd? What is your scope of work?

A: My scope of work includes the day to day operation of the mall which includes security, maintenance, housekeeping, event and marketing, any insurance issues for the mall. In addition, dealing with the owners on their outstanding service charges and finding ways how to resolves the issues for them to pay. Furthermore, also working very closely with tenants to how we can assist them in promoting their business and dealing with complaints from them.

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See lines 611 to 619 at pp. 23 to 24 of NOP.

[51] It is not disputed that all the invoices for service charges were issued by and in the name of the plaintiff and payment was made to the plaintiff and not J Sani. Further, the major decisions concerning the management of the said mall were made by the Chairman of the plaintiff (David Wong) who is not a Director of the plaintiff at all material times. The undisputed evidence shows that the said Chairman by himself owns many shop lots and his family members own a major stake in the said mall. DW2 stated that:

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Q43: Can you confirm if the Chairman of the U1BH, the key person running the company owns many units in the mall and his own family members also own major stake in the said Mall?

D

A: Yes, I can confirm that.

Q44: If that's the case, do you know who manages and operate his and his family members' units?

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A: I was told the Chairman himself.

Q45: What is the name of the Chairman?

A: Mr David Wong.

F

See lines 1569 to 1579 at p. 59 of NOP.

Q47: Do you agree that David Wong is the key person who actually manages the mall, making decision and undertaking all property management in respect of 1Borneo Hypermall and not J Sani and Taylor Hobbs?

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A: I know he makes major decisions regarding the management of the mall.

Q48: Do you have any knowledge whether J Sani and Taylor Hobbs were appointed to manage the mall or for the sole purpose of the property management license?

H

A: Both J Sani and Taylor Hobbs do assist in the management of 1Borneo Hypermall.

See lines 1611 to 1621 at p. 60 of NOP.

Q1: After the appointment of the Plaintiff to manage the 1Borneo Hypermall, the unit owners are required to pay the service charges and other outgoings to the Plaintiff or to the Liquidator, what is the position?

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A A: We follow the old practice prior to the appointment that is to pay to the property manager, the Plaintiff.

Q2: After the Plaintiff collect the service charges and other outgoings, does the Plaintiff pay all the monies they collected to the Liquidator or do they have to deduct some of the expenses, costs or their own fees?

B

A: *Yes, they are supposed to pay but they did not pay us. Only recently they submitted the accounts to us upon our request and we found that they (Plaintiff) are keeping an amount not less than RM2.5 million from the unit owners.* (emphasis added)

C See lines 1818 to 1830 at p. 68 of NOP.

[52] The undisputed evidence of DW2 shows that from 1 January 2019 onwards until the trial, the plaintiff was actively involved in managing and making major decision concerning the said mall including the issuing of invoices, statement of accounts and collection of the service charges from the respective purchasers or parcel owners. This is not a one-off or isolated property management transaction. See *Kunci Semangat Sdn Bhd v. Thomas Varkki MV Varkki & Anor* [2022] 1 LNS 424; [2022] 3 MLJ 857 CA. There is no separate invoice from the plaintiff to the liquidator for payment of its services rendered as property manager of the said mall. It appears that the plaintiff's remuneration for providing property management services to manage the said mall is derived or paid from the service charges collected from the purchasers or parcel owners. The evidence of the liquidator, DW2 shows that the plaintiff still retains not less than RM2.5 million from the unit owners which the plaintiff was supposed to pay but did not pay to the liquidator.

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[53] The evidence of DW2 shows that the plaintiff only recently gave to the liquidator an account for the service charges and/or sinking fund collected from the purchasers/parcel owners. However, the said accounts (whether audited or otherwise) were not tendered in court as evidence. It is therefore unclear which parcel owner have or have not paid the service charges and sinking fund and how and for what expenditures were such monies or fund spent by the plaintiff. This may give rise to the risk of a conflict of interest where the property manager and the plaintiff whose chairman and family owns a substantial stake in the said mall are the same or closely related. The said amendment Act was intended to regulate persons or firms/companies who carry out property management practice or act as a property manager by requiring such persons or bodies to obtain an authority or license to practice and are registered by the Board of Valuers, Appraisers, Estate Agents and Property Managers. The evidence also shows that J Sani was assisting the plaintiff in managing the said mall but it was the

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plaintiff and/or its Chairman who made the major decisions in managing the said mall with the aid of what the liquidator, DW2 had described as “a third party licence” issued to J Sani.

[54] The undisputed evidence clearly shows that the plaintiff’s scope of work fell within the purview of property management practice as set out in s. 22I of the VAEAPMA 1981. In *Malaysia Land Properties Sdn Bhd & Anor v. Simesilk Sdn Bhd* [2014] 7 CLJ 1117; [2014] MLJU 1904, the High Court (per Nallini Pathmanathan J) (as Her Ladyship then was) held:

[19] The finding of the learned Sessions Court Judge, namely that P2’s work scope fell fairly within the purview of s. 2 of the VAEA is therefore, with respect, correct. In other words the learned Sessions Court Judge was entirely correct in finding that P2 is the building and/or property manager of Plaza Damas as borne out by the said agreement between P1 and P2.

[20] The learned Sessions Court Judge then relied on s. 21 of the VAEA where it specifically provides that unless one is registered with the relevant board under the VAEA, that entity or person cannot act as a property manager and carry out works that fall within the definition of property management as well as collect fees for the services rendered. Was the learned Sessions Court Judge wrong in so concluding, namely that a property manager needs to be registered under the VAEA prior to undertaking this scope of work on behalf of a developer of a development? This issue was considered in *Lee Ming Chong Sdn Bhd v. Prudential Properties Sdn Bhd* [2011] 1 LNS 1322; [2012] 8 MLJ 1 by Lee Swee Seng, JC (now judge). The learned judge in that case considered the effect of s. 21(1)(aa) of the VAEA. In that case the court had the benefit of the evidence of a witness from the Board of Valuers, Appraisers and Estate Agents Malaysia who confirmed the Board’s letter that an entity could not collect service charges without a license under r. 49 of the Valuers, Appraisers and Estate Agents Rules 1986 read together with r. 25B(1) and (3). This witness had been authorised by the Board to give evidence. She further testified that the exception to s. 21(1)(aa) is provided under s. 21(2) where the owner of any land, building and any interest therein who manages such land, building and interest is exempted.

[21] The learned judge went on to consider the issue of who may provide the services of a property manager and collect fees and charges for the services rendered. He also relied on s. 23(1) of the Act. The section provides as follows:

No registered valuer, appraiser or estate agent shall practise valuation, appraisal or estate agency or have the right to recover in any court any fee, charge or remuneration for any professional advice or services rendered by him pursuant to his practice unless he practises as a sole proprietor of a sole proprietorship, a partner of a partnership, a shareholder or director of a body corporate registered with the Board, or as an employee of such sole proprietorship, partnership or body corporate.

- A [22] He concluded that the entity or company in his case was not licensed to provide such a service under the Act. In like manner it would appear that P2 does not also fall within the purview of s. 23 above. I would respectfully adopt the reasoning of Lee Swee Seng, J in the foregoing case to conclude that P2 is not licensed to take on the role of property manager as it has no licence as required under the VAEA.
- B [23] The appellants maintain that it is not necessary to turn to the VAEA as the relevant legislation is the *Strata Titles Act 1985*. But that Act too affords no provision for a developer to utilise its subsidiary and appoint it as agent to collect services charges on its behalf. The lack of an express prohibition in the Act does not mean that P2 is therefore entitled to do so. In this context it would appear to
- C the court that the learned Sessions Court Judge did not err in coming to her conclusions on P2 albeit in fact or in law. There is no reason therefore to alter or reverse her findings in this regard. In other words, it appears to this court that property manager as utilised or envisaged in the *Strata Titles Act* means property manager as defined in the VAEA. As such P2 needs to be licensed to collect services charges for services rendered as a property manager. In the absence of such a licence it cannot make claim for such charges (see
- D *Carol Christopher Pelly v. Puspa Muniandy* [2012] 1 LNS 442; [2012] MLJU 576 where the court held that it was an offence to carry out property management as provided for under s. 30 of the VAEA unless the person is licensed and registered under the said Act. (emphasis added)
- E [55] In the present case, it is an undisputed fact that the plaintiff is performing services as a property manager in managing the said mall and falls within the ambit of s. 22I of the VAEAPMA 1981. As such, the plaintiff needs to be licensed and registered under the said Act to collect service charges for services rendered as a property manager. It is undisputed that the
- F plaintiff does not have a licence to carry out services as a property manager and collect service charges as required under the VAEAPMA 1981. In the absence of such a licence, the plaintiff cannot make a claim and recover in court such fee or service charges pursuant to s. 22J(1)(f) of the VAEAPMA 1981. See also *Carol Christopher Pelly lwn. Puspa Muniandy* [2012] 1 LNS 442.
- G [56] The plaintiff did not authorise or arrange with J Sani who is licensed under the VAEAPMA 1981 to issue invoices, statement of accounts for service charges and claim for the outstanding service charges. In this action, the plaintiff is bringing this suit in its own name to make a claim for service charges against the defendant. Without being licensed or registered by the
- H Board to take up the role of a property manager and to collect service charges for services rendered as a property manager of the said mall, the plaintiff has no *locus standi* to make a claim for service charges against the defendant. See *Lee Ming Chong Sdn Bhd, Malaysia Land Properties* and *Carol Christopher Pelly* above.
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[57] The plaintiff contends that it was authorised by the owner of the land through a Power of Attorney to manage the said mall and the plaintiff is exempted under s. 22J(2) of the VAEAPMA 1981 from the requirement to be registered as a property manager. Section 22J(2) and (3) provides as follows:

(2) Paragraph (1)(b) shall not apply to the owner of any land, building and any interest therein who manages such land, building and interest.

(3) For the purposes of subsection (2), “owner” in relation to any land, building and any interest in the land or building means:

(a) the registered owner;

(b) the beneficiary of any estate or trust of a deceased person; and

(c) a lessee whose interest is registered under the National Land Code (Act 56 of 1965), the Sarawak Land Code (Sarawak Cap. 81) and the Sabah Land Ordinance (Sabah Cap. 68).

[58] There is no evidence to show that the plaintiff is the registered owner or the beneficiary of any estate or trust of a deceased person or a registered lessee of the said land and the building thereon, *ie*, the said mall. Further, the Power of Attorney was granted to the developer and not to the plaintiff. As such, the plaintiff does not come within the meaning of “owner” as defined in s. 22J(3) and the plaintiff is not exempted under s. 22J(2) from registration as a property manager.

[59] As the plaintiff was managing the said mall since 1 January 2019 without an authority to practice or being registered by the Board, the plaintiff had contravened s. 22I of the VAEAPMA 1981 and the claim for service charges for services rendered as a property manager of the said mall pursuant to the three letters of appointment is tainted with illegality. In *Mok Shook Mooi (aka Sherene Mok) v. Perbadanan Pengurusan Prisma Perdana (Through Its Secretary, Wong Kui Man) & Ors* [2017] 1 LNS 333; [2016] MLJU 1570, the High Court held:

[370] The issue that arises is that *the business activities of the plaintiff is tainted with illegality*. This is because *the plaintiff has contravened the express provisions of the Valuers, Appraisers & Estate Agents Act 1981 (Act 242), viz s. 22(1)(aa), s. 22B(1a) and s. 22C, and also the Strata Titles Act 1985 (Act 318)*. The plaintiff has also contravened the in-house rules of the PPC and the by-laws of DBKL because she had conducted the business activities of the 2 (two) firms from the residential unit in the PPC.

[371] As far as contracts are concerned, *it is well settled that the Court will not assist parties, who are in breach of s. 24 of the Contracts Act 1950, to enforce their contracts. Hence, any contract tainted with illegality cannot be enforced* (see *Lee Chee Aik & Anor v. Siow Moon Yeow* [2013] 1 LNS 258, which was upheld by the Court of Appeal).

(emphasis added)

- A [60] The plaintiff contends that it has complied with s. 22I by appointing a third party licensed and registered property manager, J Sani to manage the said mall. The VAEAPMA 1981 does not expressly prohibit a company from appointing a third party registered property manager to manage a building or property. However, this does not detract from the agreed fact that
- B the plaintiff was appointed by the liquidator to manage the said mall and the plaintiff was actively involved in managing the said mall including making the major decisions concerning the management of the same without any authority or licence as required under the VAEAPMA 1981. It is observed that this action was not instituted by J Sani. The plaintiff is now suing in its
- C own name for service charges due for managing the said mall and J Sani is not a party to this action. Section 22J(1)(e) and (f) of the VAEAPMA 1981 does not permit an unlicensed and/or unregistered property manager to undertake property management work for a fee or other consideration and disentitles such unlicensed property manager from recovering any fee, remuneration or charge for services rendered as a property manager in court.
- D In the premises, notwithstanding that the plaintiff had appointed J Sani to provide property management services to the plaintiff, this court finds that s. 22J has not been complied with by the plaintiff and consequently, the plaintiff is not entitled to recover the service charges for any services rendered as a property manager in this court. To hold otherwise would allow
- E an unlicensed property manager to circumvent the strict provisions of the VAEAPMA 1981 which is not permitted under the VAEAPMA 1981 and s. 24 of the Contracts Act 1950. See *Mahmood Ooyub v. Li Chee Loong & Other Appeals* [2020] 1 LNS 660; [2020] 6 MLJ 755 CA. In *Global Globe Property (Melawati) Sdn Bhd v. Jangka Prestasi Sdn Bhd* [2020] 6 CLJ 1; [2020] MLJU 424, the Court of Appeal (per Lee Swee Seng JCA) held:
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[152] The *device of using a sale and purchase agreement as a security for a loan is clearly to circumvent the protective provisions of the Moneylenders Act 1951*. Even if the plaintiff lender is not a moneylender at all it would be an aberration to allow such a person to charge interest of RM400,000.00 for a loan of 3 months when even a licensed moneylender would blush under it. A person who is not a moneylender cannot under the guise of a friendly loan exact more onerous terms than what a licensed moneylender is permitted as that would turn the law upside down.

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- H [154] *The transaction is illegal as it is forbidden by the Moneylenders Act 1951 and further if allowed, would defeat the purpose of the law*. It would also be against public policy. The transaction is caught by section 24(a), (b) and (c) of the Contracts Act 1950 that provides as follows:

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24 What considerations and objects are lawful, and what are not

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The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

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(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

(emphasis added)

See also: *Mok Shook Mooi (aka Sherene Mok) v. Perbadanan Pengurusan Prisma Perdana (Through Its Secretary, Wong Kui Man) & Ors* [2017] 1 LNS 333; [2016] MLJU 1570, in para. 59 above.

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[61] Applying the principles enunciated by the courts in *Mahmood bin Ooyub, Global Globe Property* and *Mok Shook Mooi* above, this court finds that the contractual arrangements by the plaintiff with J Sani that has the effect of enabling the plaintiff to act as a property manager and collect service charges through a third party licence would circumvent the provisions regulating the registration and authority to practice as a property manager as stipulated in the VAEAPMA 1981 and defeat the purpose of the law. As the said contract or business arrangement would be in breach of s. 24 of the Contracts Act 1950, it is tainted with illegality and the court will not assist parties to enforce such contracts.

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Issue (ii) – No Privity Of Contract

[62] In the light of the above findings on issue (i) and (iii), it follows that there is no privity of contract between the plaintiff and the defendant. The SPA was entered between Sagajuta and the defendant. The plaintiff is not a party to the SPA. Hence, this court finds that the service charges should be paid to the liquidator on behalf of Sagajuta (Sabah) Sdn Bhd (in liquidation). In *Malaysia Land Properties Sdn Bhd & Anor v. Simesilk Sdn Bhd* [2014] 7 CLJ 1117; [2014] MLJU 1904, the High Court held:

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[24] In this context it is pertinent to note that **there is no privity between P2 and the respondent. The nexus or privity is between P1 and P2.** This is added reason why the **respondent is not obligated to make payment to P2 in respect of invoices rendered by it.** I concur with learned counsel for the respondent that the **respondent had never authorised or consented to an assignment of P1's rights and responsibilities to P2.**

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[25] It also appears to the court that **as the respondent entered into the SPA and DOMC with P1, all claims for outstanding monies ought to be made by P1 and not P2.** And this too is answered by the finding of the learned Sessions Court Judge that the appellants failed to prove that Plaza Damas had been properly maintained. (emphasis added)

I

A Conclusion

[63] After considering the totality of the evidence and the submissions filed by the parties, this court finds that the plaintiff has failed to prove on a balance of probabilities that it has the *locus standi* to institute and maintain this action for service charges against the defendant.

B

[64] Conversely the defendant has established on a balance of probabilities that the plaintiff had breached s. 22J of the VAEAPMA 1981 and is disentitled from recovering any fee or service charges from the defendant in court under s. 22J(1)(f) of the VAEAPMA 1981. The defendant has also established that the outstanding service charges should be paid to the liquidator on behalf of Sagajuta (Sabah) Sdn Bhd (in liquidation).

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[65] Based on the aforesaid reasons, the plaintiff's claim herein is dismissed with costs in the sum of RM20,000 to be paid by the plaintiff to the defendant subject to payment of allocator fee.

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